TESTIMONY IN OPPOSITION TO SB 242
SENATE BUSINESS, LABOR AND ECONOMIC AFFAIRS COMMITTEE
JERRY KECK, ADMINISTRATOR, EMPLOYMENT RELATIONS DIVISION
MONTANA DEPARTMENT OF LABOR AND INDUSTRY
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Mr. Chairman, members of the committee, my name is Jerry Keck. I am the administrator in the Employment Relations Division of the Department of Labor and Industry. I rise in opposition to SB 242 because it will undue the intent of SB 108 from the 2005 legislative session. SB 108 was the result of a 2 year study by a comprehensive group of stakeholders to craft to solution to a Supreme Court decision that nullified the value of the independent contractor exemption issued by the Department at that time.

**A LITTLE HISTORY**

In 2003 the Montana Supreme Court issued a decision in Wild v. Fregein Construction. Kelly Wild had an independent contractor exemption as a roofing contractor issued by the Department from 1993 up to the time he was injured in October of 2000. In July 2000 his roofing business failed and he approached Russ Fregein looking for work. Fregein offered Wild the choice of either working for $20 per hour as an IC or $15 per hour as a "legit" employee. Wild chose to take the higher wage and work as an IC.

On October 17, 2000, Wild fell off a roof and suffered serious and debilitating injuries to his head. Somewhere between the time he left the roof and hit the ground, he asserted that he was an employee. All of the evidence in the case established that Wild was in fact treated as an employee. And the court concluded that the IC exemption issued by the Department was **NOT** a conclusive determination of Wild's status. The court concluded, "If it looks like a duck, walks like a duck and quacks like a duck, it must be a duck; even it it is holding a piece of paper that says it is a chicken".

The court concluded that the department's process at that time of simply certifying that the applicant swore that he was independently engaged in an established trade was not a conclusive determination which the statute intended. The court essentially invalidated the independent contractor exemption process that was in place with the Department at that time. The fee at the time was $25. All that the Department was able to do with a $25.00 application fee was process and issue the applications based on the signed application asserting that the applicant was an independent contractor. There was no field audits or verification that person working under the IC exemptions were in fact operating as an independent business, free from control of the hiring agent.

In spite of it's good intentions, SB 242 would take us back to the situation we had prior to the Wild decision. We would again have a simple sworn statement from those seeking renewal of their IC exemptions, that they are an independently established business.

The 2003 Legislature established a study group comprised of a broad representative stakeholder group to look at the issues raised in Wild and craft solutions. The group met for 18 months in the interim and offered SB 108 which was passed by the 2005 legislature. That is essentially what is currently in place. It requires the Department to actually verify through documentation that an applicant is engaged in an independently establish trade, occupation, profession or business. It provided for field monitoring and enforcement to verify that persons working under an independent contractor exemption were in fact working independently and that all person asserting they are independent contractors have the exemption. SB 108 was crafted to insure that the IC exemption certificate would actually hold up as conclusive as to status as in independent contractor or employee. The statute provides that an individual performing services for remuneration is considered to be an employee unless the individual has obtained the independent contractor exemption certificate. (Pass out list of members of IC Study Group)

How does SB 242 undermine the intent of SB 108 from the 2005 session?

First, it attempts to create a special category of casual employment for certain agricultural situations. (Page 2, lines 14-15) I point out that (6) (a) defines that casual employment is NOT employment that is in the usual course of the business of the employer. The examples given for why this new definition is needed clearly indicate that the work to be performed IS the usual work in the business of farming or ranching.

Second, the reduction of the fee from $125 to $25 (page 6, line 29) will return us to the pre-Wild situation where all the department will be able to do is issue IC exemptions based on the sworn affidavit of the applicant. This reduction will reduce the revenue for this program by approximately $650,000 which is more than ½ of the current operating budget of the program. All of the field audit staff will have to be dismissed and the only remaining staff will be the office staff that processes the paperwork associated with applications and issue the certificates.

Third, the amendments on page 7, line 18 through 29, undue most of the changes agreed to in the 2009 session intended to streamline the renewal process and make it easier for the applicant. The language striken on lines 28 and 29 remove the ability of the Department to verify the validity of documents that are still valid and return us to a situation where we would have to require the applicant to resubmit those documents.

For all of these reasons, the Department opposes SB 242. Mr. Chairman, I am available to answer any questions that the committee may have.